

Exhibit D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

STONINGTON PARTNERS, INC.,)
ET AL.,) C.A. No. 04-10411-PBS

PLAINTIFFS)
VS.) Courtroom No. 19

DEXIA, S.A., ET AL.,) 1 Courthouse Way

DEFENDANTS) Boston, MA 02210

GARY B. FILLER, ET AL.,) C.A. No. 04-10477-PBS

PLAINTIFFS)

VS.)

DEXIA, S.A., ET AL.,)

DEFENDANTS

JANET BAKER, ET AL.,) C.A. No. 04-10501-PBS

PLAINTIFFS)

VS.)

DEXIA, S.A., ET AL.,)

DEFENDANTS

MOTION HEARING

JULY 28, 2006

2:55 p.m.

BEFORE THE HONORABLE PATTI B. SARIS

UNITED STATES DISTRICT COURT JUDGE

VALERIE A. O'HARA

OFFICIAL COURT REPORTER

1 A P P E A R A N C E S:

2 Bernstein, Litowitz, Berger & Grossman, LLP, by
3 STEVEN B. SINGER, ESQ., 1285 Avenue of the Americas,
New York, New York 10019, for the Plaintiffs;

4 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., by
5 PETER M. SAPAROFF, ESQ., One Financial Center, Boston,
Massachusetts 02111, for the Defendant Dexia Bank Belgium;

6 Clifford Chance, by JAMES B. WEIDNER, ESQ. and THOMAS
7 TEIGE CARROLL, ESQ., 31 West 52nd Street, New York, New York
10019-6131, for Defendant Dexia Bank Belgium;

8 Gregory, P. Joseph Law Offices, LLC, by SUSAN M.
9 DAVIES, ATTORNEY, 805 Third Avenue, 31st Floor, New York,
New York 10022, for Gary Filler & Larry Perlman, TRA Rights
Trust;

10 Berman, DeValerio, Pease, Tabacco, Burt & Pucillo, by
11 PATRICK T. EGAN, ESQ., One Liberty Square, Boston,
Massachusetts 02109, for Class Plaintiffs.

12 Boies, Schiller & Flexner, LLP, by KAREN C. DYER,
13 ATTORNEY, 255 South Orange Avenue, Suite 905, Orlando,
14 Florida 32801, for JKBaker, LLC, JMBaker, LLC, James Baker
and Janet Baker.

PROCEEDINGS

THE CLERK: All rise. United States District Court for the District of Massachusetts is in session. Please be seated. Case of Stonington Partners, Incorporated, et al vs. Dexia S.A., Civil Action 04-10411 and Civil Action Nos. 04-10477 and 04-10501 will now be heard before this court. Would counsel please identify themselves for the record.

MS. DYER: Karen Dyer, counsel for the Bakers.

MR. SINGER: Good afternoon, Steven Singer, Boston counsel for the Stonington plaintiffs.

MS. DAVIES: Susan Davies of the firm of Gregory.

THE COURT: You made it.

MS. DAVIES: Yes, just a moment ago representing trustees of the TRA Rights Trust.

MR. SAPAROFF: Your Honor, Peter Saparoff from Mintz, Levin representing Dexia Bank Belgium.

MR. WEIDNER: James Weidner, Clifford Chance for Dexia.

MR. CARROLL: Thomas Carroll also for Clifford Chance, Dexia.

MR. EGAN: Patrick Egan, class plaintiffs, just observing.

THE COURT: You love this case so much.

1 MR. EGAN: That's right.

2 THE COURT: You want to be here. We have a
3 motion for judgment on the pleadings, and I've read
4 Judge Cederbaum's opinion. She's the judge in the Southern
5 District who ruled on a different case. I don't believe
6 collateral estoppel or res adjudicta are in mind, but
7 obviously what her view of what New York law is is relevant
8 and I think correct so I guess we should go from there.

9 MR. WEIDNER: Thank you, Judge. We think passing
10 collateral estoppel that the complaint should be dismissed
11 under the fraud count and aiding and abetting and going to
12 the conspiracy count. Going first to the fraud count, which
13 is only in the Baker complaint, as it was in the Hamdan
14 case, and here, as there, there were no misrepresentations
15 made by Dexia or Artesia, et al. to the Dragon owners, there
16 just wasn't, there couldn't have been any misrepresentation
17 because there was no representation.

18 They argued, well, you can have fraud by actions
19 of will, but in those circumstances, you need some duty to
20 disclose, and typically a fiduciary duty or some special
21 relationship, and there was none as between Dexia and
22 Dragon. There just wasn't any relationship at all, so as in
23 Hamdan, Judge, we believe that the fraud common law
24 complaint should be dismissed. Then as to aiding and
25 abetting, again, as in Hamdan, we believe it should be

1 dismissed.

2 THE COURT: Do you know what, I didn't find the
3 Hamdan comparison that persuasive simply because I know this
4 case so well and there are such different factual
5 situations. I mean, I've read all the e-mails involving
6 Hamdan and as well the e-mails involving Dexia, and it's
7 just a different situation because Dexia was involved in the
8 financing for the two companies.

9 MR. WEIDNER: Of the LDCs?

10 THE COURT: Yes, yes.

11 MR. WEIDNER: Don't let me forget --

12 THE COURT: And also knew about some of the
13 financings for the acquisition of Dragon and Dexia.

14 MR. WEIDNER: Let me turn to that.

15 THE COURT: I'm not saying the law isn't relevant,
16 but maybe the thought process, but --

17 MR. WEIDNER: Very good, Judge. I will not
18 mention Hamdan again.

19 THE COURT: No, no, that's fine. I understand why
20 you brought that opinion to my attention, it's just
21 factually distinguishable, so let's just focus on this.

22 MR. WEIDNER: Fair enough. Fair enough. Aiding
23 and abetting requires actual knowledge of the scheme or the
24 misrepresentations, and there is none here as to Dexia. As
25 to the Dragon transaction, well, let me first step back and

1 say that certainly at the time that Artesia did the loans to
2 the LDCs, 1998 or even earlier, in 1997, they couldn't have
3 had actual knowledge because even LNH didn't know about the
4 transactions, but then if you bring it forward to the time
5 of the transaction themselves in terms of Dragon, Dexia
6 had -- Artesia had no involvement at all in the transaction.

7 And, in fact, the plaintiffs say in their
8 complaint that, well, it was publicized so they must have
9 known it, and they were bankers to LNH, but that doesn't
10 prove that we had any knowledge of what was going in the
11 transaction itself. We had zero connection with it.

12 THE COURT: I thought you helped finance it?

13 MR. WEIDNER: No, not the Dragon transaction,
14 Judge.

15 THE COURT: This is where I need this oral
16 argument. I don't necessarily remember the distinctions
17 between Dragon and Dexia, so you're starting off with
18 Dragon?

19 MR. WEIDNER: Right. That's the Baker and Filler
20 cases.

21 THE COURT: All right.

22 MR. WEIDNER: In which they don't allege, in fact,
23 because it's true, Artesia had no involvement at all. Now,
24 as to Dictaphone, which is Stonington.

25 THE COURT: Don't allege they had involvement in

1 financing the acquisition?

2 MR. WEIDNER: No involvement of any sort including
3 financing.

4 THE COURT: Okay. Now, that's different from
5 Dictaphone, right?

6 MR. WEIDNER: Dictaphone is different. In terms
7 of knowledge at the time of the Artesia LDC transactions,
8 it's the same. Obviously they had no actual knowledge, but
9 now turning to the time of the merger transaction between
10 Stonington, or, I'm sorry, Dictaphone and Artesia LNH, in
11 fact, it is true that Artesia participated in a syndicated
12 financing of \$400 million or more, in effect, took out the
13 debt that Dictaphone had and allowed LNH effectively to
14 assume it, but, anyway, it extended, it was part of that
15 loan syndicate and extended I believe \$50 million of the 400
16 million or so, but we don't see that that does anything more
17 than show that they knew the transaction was going on, but
18 they weren't part of the negotiations or the due diligence
19 or anything in terms of the merger transaction, they were
20 indeed providing debt financing for the transaction, but in
21 our view, rather than showing that, therefore, Artesia was
22 part of some kind of a scheme here, we believe it shows the
23 contrary because if in fact it were the case that Artesia
24 knew this was a house of cards that was about to fall apart,
25 which in fact it did, why on earth would it be providing

1 \$50 million in financing, so to the extent --

2 THE COURT: That's beyond what I'll do in a motion
3 to dismiss.

4 MR. WEIDNER: I agree, Judge, but they're trying
5 to argue for an inference the other way, and what I'm saying
6 is you can deeply infer that it's just being the contrary.
7 In any event, the point being for the motion to dismiss, the
8 complaint itself simply refers to the loan, and in our view
9 that does not give rise to a sufficient allegation, actual
10 knowledge of what misrepresentations, if any, were being
11 made during the negotiations or the scope of the due
12 diligence; and, secondly, now passing from actual knowledge
13 in terms of reasonable foreseeability, as in any tort case,
14 you need to have reasonable, foreseeable harm, and that's
15 true for aiding and abetting as well.

16 And in this case we don't believe that the
17 complaints allege sufficient reasonable foreseeability.
18 Now, they do say that in terms of the public market that it
19 would be reasonably foreseeable that if LNH were going to
20 hook up its financials, that would have an effect on the
21 public market, but it's another thing it seems to us anyway
22 for them to say that it was reasonably foreseeable at the
23 time of these transactions in 1998 that two years later
24 they, being LNH, would acquire a company, not only acquire
25 it but acquire it for stock, takes it too far.

1 The way Stonington argues the standard for
2 reasonable foreseeability here is that it includes general
3 harm suffered by all LNH investors. We say that's too broad
4 because it's not reasonable foreseeable in our view that
5 this transaction would occur two years earlier, but more
6 than that, if we really take that broad a definition, it
7 would mean, I suppose, more than suppose that, assume that
8 LNH took out a huge mortgage or other loan, which it
9 collateralized, secured with its stock and indeed the note
10 loan wasn't paid, the lender becomes an investor in LNH,
11 does that mean that Artesia is now liable to that creditor
12 or somehow LNH stock was involved in a derivative
13 transaction in which the nominal value of the transaction
14 was LNH stock which means the counter-party now has a claim,
15 does that mean that Artesia is liable to that person, or
16 taken to its logical extreme, let's say there's a large
17 supplier of technology equipment, says, well, I depended on
18 the --

19 THE COURT: What if you looked at it this way
20 with respect to Stonington that essentially Artesia was
21 financing a transaction knowing that LNH must have been
22 making misrepresentations about its balance sheet because
23 everyone is going to look at a balance sheet and say they
24 aided and abetted by financing it?

25 MR. WEIDNER: I'm not sure that they would know

1 what the other side would find in the due diligence.

2 THE COURT: So why wouldn't it be reasonably
3 foreseeable that the revenue from the fraudulent entities
4 would be relied upon by what are they, the Dictaphone
5 people, in this acquisition?

6 MR. WEIDNER: But the reasonable foreseeability it
7 seems to me applies back at the time that Dexia did the
8 alleged bad transactions.

9 THE COURT: Yes, but that would be a stronger
10 argument for Dragon.

11 MR. WEIDNER: Yes, I agree.

12 THE COURT: So, Dragon, I can understand your
13 claim, and I'll decide, which is you do a fraud way back
14 when and you know it will be a fraud on the market
15 perhaps.

16 MR. WEIDNER: Right.

17 THE COURT: But you don't necessarily foresee
18 five down years the road -- how many years down the road?

19 MR. WEIDNER: Two.

20 THE COURT: Two years down the road an
21 acquisition. Doesn't the fraud get renewed when you
22 participate in a financing?

23 MR. WEIDNER: Well, I'm not sure that
24 participating -- we're putting --

25 THE COURT: Aiding and abetting a financing where

1 you know the misrepresentation is being made.

2 MR. WEIDNER: I understand, but we are putting
3 \$50 million, we, the bank is putting \$50 million into this
4 transaction, putting itself at risk where it didn't have to,
5 and I'm not sure I make the connection with aiding and
6 abetting a fraud because why would they --

7 THE COURT: Could you make the reasonable
8 inference that you know that that revenue is being relied
9 upon by the Dictaphone folks?

10 MR. WEIDNER: I'm not so sure, Judge. This is now
11 2000, and they're looking at revenue really at the time.
12 This gets too much into facts, but it bears on what you're
13 saying, what they're really looking at is '99 revenue.
14 You'll remember that the LDC transactions, the liquor and
15 radio ones were in '98, and so it was the '98 financials, if
16 any, were affected, they were affected.

17 THE COURT: Why wouldn't it be the '99
18 financials?

19 MR. WEIDNER: Because the transactions occurred,
20 the revenue was taken in 1998, not 1999.

21 THE COURT: Why?

22 MR. WEIDNER: Because the transactions occurred in
23 1998, and that's when the revenue was taken in.

24 THE COURT: I think they were ongoing entities.

25 MR. WEIDNER: But the revenue was a one-time

1 thing, it wasn't recurring.

2 THE COURT: I actually didn't -- I thought it was
3 a continuing licensing stream, no?

4 MR. WEIDNER: There was a one-time payment. The
5 licensing agreement was continuing, yes.

6 THE COURT: Yours was a one-time payment to set
7 them up, but there continued to be a revenue stream.

8 MR. WEIDNER: No.

9 THE COURT: There's no other loan from Artesia to
10 the LDC?

11 MR. WEIDNER: I don't believe, Judge, there were
12 any other payments made or the LDCs made any other payments
13 other than the initial ones.

14 THE COURT: I just don't remember.

15 MR. WEIDNER: Well, I think --

16 THE COURT: You think they're not alleged that
17 way, okay, thank you. It's a pretty simple issue, one way
18 or another.

19 MR. WEIDNER: When you get to the conspiracy, it's
20 essentially the same.

21 THE COURT: I agree with that.

22 MS. DYER: Your Honor, on behalf of both the Baker
23 and Filler plaintiffs, I'd like to address Dragon. They
24 were very aware of the Dragon transaction, Dexia was,
25 because they contemplated financing it, they didn't finance

1 it, but they contemplated financing it. They actually had
2 documents with the Dragon pro forma when they were looking
3 at the --

4 THE COURT: Suppose that's true, I'll assume it's
5 true, they didn't do anything with respect to it, so how did
6 they aid and abet that fraud?

7 MS. DYER: Well, the fraud is overstating the
8 financial statements, and what they did is they continued to
9 participate in the fraud. We allege they've continued to
10 participate in this fraud by doing things such as making the
11 LDC, or, I'm sorry, making the Radio LIC/LDF loans look like
12 they were paid off at the end of '99.

13 In November of 2000, we've alleged that they
14 concealed the fraud so that they took affirmative steps as
15 part of the ponte scheme after they well knew about the
16 Dragon transaction, and so, no, they didn't actually finance
17 it. They talked about it. They didn't actually finance it.
18 They were still involved in the fraud. There's no case out
19 there that says that foreseeability means that by the time I
20 take the first act in a fraud, I have to know that the Baker
21 plaintiffs are --

22 THE COURT: So let's just play this through, if
23 the only fraud were back in 1998 and then it ended, you'd
24 have a hard case?

25 MS. DYER: If they didn't continue with the

1 fraud.

2 THE COURT: If all it was was that initial loan,
3 you'd have a problem?

4 MS. DYER: It would be a different case. I
5 haven't analyzed that so I can't say yes or no.

6 THE COURT: What you're saying, they continued to
7 do things to aid and abet that fraudulent acquisition?

8 MS. DYER: After they knew we existed.

9 THE COURT: What?

10 MS. DYER: That we were taking stock and that we
11 were taking the risk of the volatility of the stock.

12 THE COURT: What did they do while they knew
13 about it that you would have relied on?

14 MS. DYER: They --

15 THE COURT: My pronouns are terrible. What did
16 Artesia do after Artesia knew about your client's, the
17 Dictaphone people, discussing the possibility of merging in
18 a way that your people, the Dictaphone people, would have
19 been relying on it?

20 MS. DYER: They told the auditors, we believe, and
21 this has come out in discovery that three loans, Radio LIC
22 and LDF had been paid off on December 30th, 1999, when in
23 fact they were not repaid until January of 2000 so that that
24 revenue didn't have to be reversed and so that there was no
25 question about the revenue that had been booked previously.

1 That's alleged in the complaint, your Honor. They also
2 continued after that.

3 THE COURT: Do you have the paragraph that that's
4 in?

5 MS. DYER: Yes, if you look at the complaint at
6 paragraph 85.

7 THE COURT: It says that Artesia made an actual
8 misrepresentation to --

9 MS. DYER: No, what we talk about is that the
10 ponte scheme was still going on January 5th, 2000. We
11 described what is in the complaint, in the paragraphs that
12 surround that what they were doing, which was they were
13 paying off or making it look like a loan was paid off on
14 December 30th, 1999, that it was not paid off in fact until
15 January 5th. In terms of the reasons for it, I mean, that's
16 really come out in discovery.

17 THE COURT: Just back off because I don't know
18 the facts. It is alleged in this complaint that there were
19 specific misrepresentations made from Artesia to Dictaphone?

20 MR. WEIDNER: Judge, I think you mean Dragon.

21 THE COURT: I'm sorry, Dragon.

22 MS. DYER: That there were specific
23 misrepresentations by whom, I'm sorry?

24 THE COURT: By Artesia to Dragon?

25 MS. DYER: No, I mean, there's not a specific

1 misrepresentation directly from Artesia to anybody.

2 THE COURT: That's what I wanted to know.

3 MS. DYER: Alleged in this complaint.

4 THE COURT: So now you're saying, no, they didn't
5 make a direct misrepresentation but they knew about the
6 transaction and were taking specific steps to cook the
7 books?

8 MS. DYER: To cook the books.

9 THE COURT: While the acquisition --

10 MS. DYER: To cook the 1999 books. This would
11 have cooked the 1999 books. Your Honor, we don't have, I
12 want to be clear, the allegations talk about what they did.
13 The discovery has linked up in many respects while they were
14 trying to do it and while they were trying to conceal it
15 from the auditors, but I don't think it's particularly
16 appropriate at this point to say, well, you should have
17 alleged that beforehand. We alleged their acts in 1999 and
18 that it had an impact on the 1999 financials. We relied on
19 the 1999 financials. They knew about our transactions. As
20 it turns out, discovery has revealed they knew about our
21 transaction in December of '99 before they took the acts in
22 January of 2000 alleged in paragraph 86 of the complaint.

23 THE COURT: When was the acquisition?

24 MS. DYER: The acquisition was June 7th, 2000.

25 THE COURT: So it was afterwards?

1 MS. DYER: The acquisition was afterwards, yes.

2 THE COURT: Thank you.

3 MS. DYER: May I address Broad briefly, your
4 Honor? What Hamdan was was a misrepresentation case. It
5 alleged a misrepresentation. What the Court found was that
6 there was no misrererepresentation alleged earlier enough in
7 time on which the plaintiffs could have relied. We do not
8 allege a misrepresentation case here. We allege here a
9 conduct case. A fraud by conduct or common law fraud case
10 is consistent with cases that we cited like NEMCO, which is
11 a New York decision which says you can have fraud.

12 The defendants argued, well, that's like an
13 omission, and you have to have a special duty in order for
14 there to be an omission, and the Court said no, no, no,
15 we're talking about conduct in concealing things which goes
16 beyond any sort of straight omission case and which does not
17 require a special fiduciary duty.

18 It's in our briefs. It's the NEMCO case. They
19 tried to distinguish it, they filed this reply yesterday,
20 and they try to distinguish it by saying, well, all of the
21 conduct cases dealing with common law fraud are situations
22 where the defendant is actually in a transaction, directly
23 in a transaction with the plaintiff, but we recognize, they
24 say in their reply, that the one case you cited under
25 New York law isn't that situation, but at least the

1 defendant there was engaged in similar transactions parallel
2 to the plaintiffs, but if you look at NEMCO, what you'll see
3 is the Court found the NEMCO decision, I'll give you the
4 cite, it's a New York case, the Court found that you can
5 have fraud, but the actual Chicago Board of Commodities
6 Trading could been engaged in the fraud through their
7 conduct.

8 They never made a single representation to the
9 plaintiffs, they didn't have a special fiduciary
10 relationship in any way to the plaintiffs, but the Court
11 found in that case that you could have fraud through
12 conduct, and what they said was -- and this is at page 340
13 of the decision, it's 552 F. Supp. 332, and at 340 they made
14 clear that if NEMCO means to allege that the exchange -- and
15 that's the Commodities Exchange Board -- failed to carry out
16 their duties and intended to failure to facilitate the
17 fraudulent scheme of the other defendants, that would
18 constitute fraud. It would amount to an allegation that the
19 exchanges were participants in the fraudulent conduct.

20 This is someone, they're not a party to the
21 transaction, they're the Commodities Exchange Board out
22 there, they're alleged to have engaged in the fraud. In the
23 conduct, they made no direct misrepresentations whatsoever
24 to the plaintiff, and the Court said under New York law you
25 can have fraud by conduct. There was no special fiduciary

1 relationship. Hamdan didn't consider that. Hamdan was a
2 misrepresentation. The allegations were a misrepresentation
3 that was repeated through someone else. It was not a case
4 where fraudulent conduct was alleged, and the Court didn't
5 decide on these grounds. The Court didn't consider these
6 grounds.

7 THE COURT: Okay, thank you.

8 MR. SINGER: Good afternoon, your Honor,
9 Steven Singer, and I really have somewhat of a different
10 position, but I really wanted to expound briefly, if I may,
11 to this point about reasonable foreseeability. I'm not
12 going to respond to actual knowledge because your Honor has
13 already heard in the class cases that the allegations stated
14 were sufficient to actual knowledge on their part.

15 I'm not going to repeat those allegations, I think
16 they show and establish common law fraud, but it's a
17 reasonable foreseeability point. If you look in our brief,
18 we cited documents which showed on December 8th, 1999, these
19 entities knew about both of our deals. It's interesting to
20 me because at that time we didn't know about our deal. They
21 knew about our deal before we did. Learnout and Hausby
22 initially --

23 THE COURT: Is that alleged in this complaint?

24 MR. SINGER: No, we didn't have that fact. We
25 didn't have this document. I've never gotten motion for

1 judgment until after the close of document discovery.
2 Summary judgment maybe; motion for judgment on the
3 pleadings, no.

4 THE COURT: Actually, that's a really good point.
5 When is the motion for summary judgment due so I'm not
6 playing this game of what people know in discovery and what
7 they knew in the complaint?

8 MR. SINGER: It's due in December, your Honor, end
9 of December.

10 THE COURT: Why? If there's discovery done, why
11 don't we move it?

12 MR. SINGER: Discovery is closed but for the
13 discovery ordered by the magistrate judge on the pending
14 motions.

15 THE COURT: Let me ask you this, if this is an
16 unusual posture simply because discovery has been completed,
17 so if they're telling me things they learned during
18 discovery which they could now update and amend to add, am I
19 better off just waiting for summary judgment?

20 MR. SINGER: I think the motion should be denied
21 on the pleadings themselves.

22 THE COURT: You know, can I tell you something?

23 MR. SINGER: Yes.

24 THE COURT: This case has been a life endeavor for
25 me, it's not just that I had the big cases, but I've had

1 your cases, which are big to you, and I've had the trustee
2 of this and this of that, and it's huge. It's as big as
3 some of my multi-district litigation cases, so while you
4 might think I salivated the idea of writing another opinion,
5 I don't. It takes a huge amount of time, and I'm now doing
6 the motion for the class cert., I, as a practical matter,
7 probably won't get to this for three or four motions, and,
8 oops, there's the motion for summary judgment. So I'm sort
9 of thinking why am I looking at it through this tiny lens?
10 Why don't I just get the facts?

11 MR. WEIDNER: Judge, it's true discovery has
12 tentatively been closed, but there's an enormous amount of
13 discovery that's still going on. That's the fact of the
14 matter.

15 THE COURT: This is just separate cases, right?

16 MR. SINGER: These are the transactional cases.

17 THE COURT: Why don't I just wait?

18 MS. DYER: Your Honor --

19 THE COURT: I won't get to it for three months
20 anyway.

21 MS. DYER: Our position would be if you were
22 inclined to consider the collateral estoppel argument which
23 we believe is valid and has been weighed and all those
24 things, we would say we would want you to decide it now
25 really because it's improper. If what you're saying is you

1 need to consider it in the context of the documents because
2 we're raising these documents to you and all you're looking
3 at is that the Hanvit Bank case is one more case
4 interpreting law.

5 THE COURT: You're putting me in an awkward
6 position because you keep inserting facts you learned during
7 discovery, and I can't in my mind keep track of what is what
8 or even take those into account on a judgment in the
9 pleadings.

10 MS. DYER: Which is why we think they've waived a
11 motion for summary judgment. They've waived as well the
12 collateral estoppel.

13 THE COURT: Collateral estoppel doesn't apply.
14 It's a different case.

15 MS. DYER: It is somewhat awkward to be on a
16 motion for the summary judgment at the end of fact
17 discovery. Other than what the magistrate has ordered, fact
18 discovery is closed.

19 THE COURT: Let me ask you this, how big a deal
20 would it be for you to just simply amend your complaint and
21 then add in everything you think is relevant and I'll
22 consider it all in a motion for summary judgment?

23 MR. SINGER: I think, your Honor, at this stage of
24 the game, I think we might as well go to summary judgment
25 and we can put in all the evidence that we have and we can

1 make the same arguments. Who knows what we'll find out two
2 months from now when we depose whomever. Frankly, one of
3 the key employers of Dexia who was involved in the
4 Dictaphone financing is a man named Peter Rabaey. We tried
5 to take his deposition and couldn't. The magistrate judge
6 just ordered him to be deposed a week ago, and we still
7 don't have a date for his deposition.

8 So, I mean, I don't think it makes sense to amend
9 at this time if we're going to kick in and we're going to
10 say let's consider all the evidence on this issue, then
11 let's move it to summary judgment. If your Honor is
12 inclined, if your Honor takes this fact, in order for us to
13 show reasonably that this was foreseeable, we had to show
14 that they specifically knew about us and our deals and the
15 fact that they were getting stock and the fact that there
16 was --

17 THE COURT: Without that, particularly the
18 conduct case falls apart, unless you're acting in a
19 fraudulent way knowing about a transaction, in other words,
20 I'm very sympathetic to their argument. I mean, you do
21 something fraudulent in year 1 and then in year 6 something
22 happens you can't foresee, I'm not sure you're on the hook.
23 On the other hand, you're saying, Judge, don't go that
24 route, they knew about these transactions and continued to
25 cook the books knowing about it. If that's not all in the

1 complaint, I have a hard place to evaluate it.

2 MR. SINGER: Let me respond briefly to that. It's
3 not year 1 and year 6, their fraudulent transactions were in
4 1998 and 1999 both, that's what they did. It began in 1998.
5 I don't think it's the law that at the day they started the
6 fraud they had to know all of what.

7 THE COURT: I was using a hypothetical.

8 MR. SINGER: No, I know, I understand.

9 THE COURT: If you commit a fraud on day 1 and on
10 Day 3 something happened you couldn't have anticipated
11 through an acquisition, fine, I'll use your time framework,
12 I think they've got a strong argument. If in fact they're
13 continuing to do things while they knew about these
14 acquisitions, it's a different case. They may win, you may
15 win; but it's a different case.

16 MR. SINGER: It's a different case. Let me, what
17 they did is they helped Learned & Hausby to cook the books
18 in 1998 and 1999. 1999 financial statements are issued in
19 February of 2000, essentially a few weeks, a month before
20 our deal was announced, okay, so the impact on their fraud
21 was felt by us contemporaneously with our doing a number of
22 deals, and we clearly relied upon those financial
23 statements. So that's one thing, the ramifications of their
24 conduct were felt at the time.

25 THE COURT: That's alleged?

1 MR. SINGER: It's alleged, partially alleged, but
2 your Honor also noted in terms of -- and this is I think
3 relevant. There's two things that are relevant, that are
4 directly relevant to your decision in the class case, one is
5 their discussion about their conduct throughout 1999, and it
6 relates to something Mr. Weidner said, your Honor said by
7 mid to late 1999, Artesia became interestingly concerned
8 that the loans to the LDC were not getting paid, the loans
9 derived from the LDC were due on June 30, 1999, the
10 \$20 million personal loans to the senior officers were
11 due.

12 THE COURT: Slow down.

13 MR. SINGER: And they extended the loans to
14 December 15th, 1999. What we now know from discovery,
15 Mr. Weidner said why would we loan Dictaphone and Learned &
16 Hausby's had no knowledge when we now know that was part of
17 a quid pro quo. The reason they loaned Learned & Hausby the
18 money from Dictaphone, we think a condition of that loan was
19 that they get repaid for all these sham loans. That was the
20 deal. That was the condition they insisted on. No, that's
21 not alleged in the complaint, that particular fact. Okay.
22 That is not because we didn't know it, now we know it, we
23 have the document where it says we must get repaid on our
24 loans outstanding.

25 THE COURT: In what sense was this a fraud you

1 relied on?

2 MR. SINGER: In what sense, my client relied upon
3 Learned & Hausby's financial statements in doing this deal.
4 They were involved in financing.

5 THE COURT: I don't know it as well as you do.
6 Were the loans closed out, was that something that affected
7 the balance sheets?

8 MR. SINGER: The loans were closed out, in other
9 words, yes, these were loans in 1998 and 1999.

10 THE COURT: Were closed out, and that affected
11 the balance sheet, and you're saying that all happened while
12 they knew --

13 MR. SINGER: Of our deal and while they were
14 agreeing to finance our deal.

15 THE COURT: Is that all in the complaint?

16 MR. SINGER: What's in our complaint is the
17 allegation with respect to them, the allegation that they
18 knew or participated in the financing of Dictaphone, as your
19 Honor noted, and that should be sufficient to defeat any
20 argument that it wasn't reasonably foreseeable at this
21 stage. That's the fact that's alleged.

22 THE COURT: I understand the argument. We have a
23 choice, you can go and amend the complaint and add all this
24 stuff so that I have a real sense of where this case is
25 right now or we can all morph this into a summary judgment

1 motion.

2 MR. SINGER: We think it makes more sense to do
3 summary judgment.

4 MS. DYER: Your Honor, I don't want to be at the
5 mercy of whether I leave out one little fact somehow, you
6 know, I made a general allegation, I made pretty detailed
7 facts, but, oh, I left out this document on an amended
8 complaint and now we go through the process again. In
9 summary judgment, I can bring, you know, everything in.

10 THE COURT: But my concern is in reading the
11 briefs, it's a little hard for me sometimes to parse what
12 was in the complaint as opposed to what you learned from the
13 documents, and so it started looking more like a summary
14 judgment motion.

15 MS. DYER: We don't have a problem, if, you know,
16 setting aside the collateral estoppel and all that, we don't
17 have a problem with that. We do think you have to consider
18 the documents at some point probably.

19 THE COURT: What do you all think about this? I
20 mean, I know you've flown up here. Maybe you think it's a
21 waste of money?

22 MS. DYER: I came the furthest.

23 THE COURT: Where did you come from?

24 MS. DYER: Florida.

25 MR. WEIDNER: Judge, the reason we made the motion

1 is because, as you pointed out, it's a pretty simple legal
2 issue. The stuff that they're talking about now is not in
3 the complaint, and what's happened is we make a motion for
4 judgment on the pleadings, all of a sudden we get a dump
5 load of stuff from the other side saying, well, really this
6 and that. That's what changed.

7 THE COURT: You waited so long for the motion for
8 judgment on the pleadings, so in a way, although not
9 intended, I'm sure by you, they've now got discovery.

10 MR. WEIDNER: We don't think it makes any
11 difference frankly. That is to say, we don't think the
12 facts make any difference.

13 THE COURT: Let me be quite candid, this is not
14 going to be on a fast boat anywhere. When does discovery
15 end now?

16 MS. DYER: Fact discovery has ended, your Honor,
17 other than those depositions that the Court, that
18 Judge Collings has ordered and has potentially under
19 consideration right now. Expert discovery I believe ends in
20 either October or November.

21 THE COURT: And, in any event, if I knocked out
22 some of these common law counts, there's still the federal
23 counts?

24 MS. DYER: The federal counts are still there,
25 yes.

1 MR. WEIDNER: The 10(b)5 claim, depending what you
2 do with the 10(b)(5) claim would still be there.

3 THE COURT: Because that covers everybody?

4 MR. WEIDNER: Right. We didn't make the motion.

5 THE COURT: Not to complicate things at all, but
6 I've read the objections to Judge Collings, that's this
7 case, right?

8 MS. DYER: Yes.

9 THE COURT: Versus the class cases.

10 MS. DYER: It's all cases, your Honor.

11 THE COURT: I've read two of them. Are there more
12 than that, the one that had to do with the inadvertent
13 disclosure and one had to do with the 30A depsoction?

14 MR. EGAN: Yes, that's correct.

15 THE COURT: So let me just say today or
16 yesterday, I don't know if you've seen it yet, I've
17 basically denied both sets of objections but with the
18 following understanding which could add to the discovery
19 complications. It may well be that you're going to move for
20 a letter rogatory to that particular witness, and so you
21 should do forthwith so you don't delay that anymore. That
22 will be the route you will have to go.

23 As far as the inadvertent disclosure, I've denied
24 the objection. On the other hand, there are routes that you
25 can go if you think that while it's work product, in other

1 words, you did it on the grounds of inadvertent disclosure,
2 that's pretty much the law around here, you know, two
3 documents, two needles in the haystack, we don't do that to
4 lawyers around here.

5 On the other hand, it may be that you feel you
6 have a substantial, how do you word it, the nonopinion, if
7 you have a substantial need of it that it overcomes it?

8 MR. WEIDNER: Right.

9 THE COURT: So I'm not here to preclude either
10 you from doing the letters rogatory, just get it off in a
11 reasonable way, or if you really feel you can show a
12 substantial need from me doing that?

13 MR. WEIDNER: Understood, Judge.

14 THE COURT: I will take this under advisement,
15 but I think realistically even if I get to it before the
16 summary judgments and if I found it wasn't enough, I would
17 allow you to amend to add this stuff, so I'm not going to
18 play that game. It was hard for me reading the stuff and
19 preparing yesterday afternoon just figuring out how much,
20 because the complaints are always so massive, how much is in
21 the complaint and how much is in the documents and then they
22 would be fair to say you can't allege that stuff because
23 that's not in the complaint, the timing, all the timing
24 things, and yet I don't know of any judge who wouldn't then
25 say, well, grant it without prejudice through an amendment,

1 so I don't know that that's worth the dime right now.

2 Is there any movement at all towards settlement on
3 this thing?

4 MR. WEIDNER: Not so far, Judge.

5 THE COURT: Could we go off the record.

6 (Discussion off the record.)

7 THE COURT: I'll take this under advisement.

8 When my new law clerks come in September, it will be part of
9 the pile they get, but I think as a practical matter it
10 makes sense to wait for summary judgment, but if I do get to
11 it, if that gets delayed yet again because of the little
12 rogatory, maybe there can be, and I can get to this, I'll
13 get some legal guidance because if I rule against you
14 because some of the facts aren't in the complaint, I thought
15 they were critical, I'll let you amend and add them in.
16 Makes sense? Have a nice rest of the summer.

17 (Whereupon, the hearing was suspended at
18 3:56 p.m.)
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C E R T I F I C A T E .

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS)
CITY OF BOSTON)

I, Valerie A. O'Hara, Registered Professional
Reporter, do hereby certify that the foregoing transcript
was recorded by me stenographically at the time and place
aforesaid in No. 04-10411-PBS, In Re: Stonington Partners,
Inc., et al. vs. Dexia, S.A., et al. and thereafter by me
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